

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-6134

in the
**United States Court of Appeals
for the Second Circuit**

No. 77-6134 - 77-6136

COMMODITY FUTURES TRADING COMMISSION,
Plaintiff-Appellee,

vs.

CROWN COLONY COMMODITY OPTIONS, LTD.,
ALLEN M. GOLDSCHMIDT, ARNOLD TENNEY,
JOSEPH ALTER and JOEL STEINER,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of New York

BRIEF OF APPELLANTS
JOSEPH ALTER and JOEL STEINER

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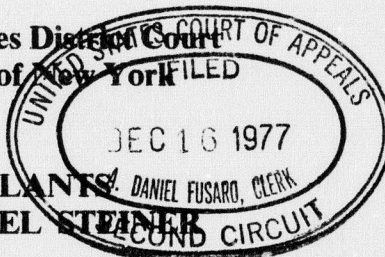




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**STATEMENT OF ISSUES
PRESENTED FOR REVIEW**

POINT I.

WHETHER DEFENDANTS JOSEPH ALTER AND JOEL STEINER WERE DENIED DUE PROCESS BY BEING COMPELLED TO PREPARE AND PRESENT A DEFENSE WITHIN AN UNREASONABLY SHORT TIME.

POINT II.

WHETHER THE TRIAL COURT ERRED IN GRANTING THE PRELIMINARY INJUNCTION IN LIGHT OF THE FACT THAT BOTH DEFENDANTS JOSEPH ALTER AND JOEL STEINER WERE NO LONGER ENGAGED IN THE COMMODITIES FIELD.



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**BRIEF OF APPELLANTS
JOSEPH ALTER and JOEL STEINER**

PRELIMINARY STATEMENT

This is an appeal by Joseph Alter and Joel Steiner, defendants below, from a preliminary injunction issued by the U.S. District Court for the Southern District of New York (Hon. Edward Weinfeld presiding), in a civil suit brought by the Commodity Futures Trading Commission ("CFTC") under the provisions of the Commodity Exchange Act (7 U.S.C. §1 et. seq.).

In this brief, the abbreviation "Tr" stands for transcript of testimony at the hearing which began June 6, 1977, and the abbreviation "Op" stands for the June 15, 1977 Opinion of Hon. Edward Weinfeld, District Judge.

STATEMENT OF THE CASE

On May 31, 1977, the CFTC filed a four-count complaint in a suit against Crown Colony Commodity Options Ltd., Allen Goldschmidt, Arnold Tenney, Joseph Alter, Joel Steiner, Samuel Pattera, Martin Davidson and Ronald Yales, seeking injunctive relief, receivership, an accounting and other equitable relief because of alleged violations of the Commodity Futures Act and related regulations. Twenty-five affidavits and a lengthy memorandum of law were also filed.

A hearing was scheduled and held before Hon. Edward Weinfeld, U.S. District Judge, on June 2, 1977, on the CFTC's Motion for Temporary Restraining Order, which motion was denied. However, a hearing was then scheduled for June 6, 1977 on the CFTC's Motion for Preliminary Injunction (See transcript of June 2, 1977 Hearing.)

The hearing was held over a three-day period beginning on June 6, 1977, after which the court issued its Opinion dated June 15, 1977. Thereafter an Order of Preliminary Injunction dated June 22, 1977 was entered against all defendants but Pattera and Yales; and the injunction was thereafter modified by an Amended Order of Preliminary Injunction entered on June 30, 1977.

STATEMENT OF THE FACTS

After months of investigation, the CFTC filed a four-count complaint, twenty-five affidavits, exhibits and a lengthy memorandum of law in New York, although five out of the seven individual defendants reside and work in Miami, Florida; one of the other two resides and primarily works in Canada; and the corporate defendant had offices in Miami and Chicago as well as New York (Complaint, pages 2-4).

Although the CFTC had conferred with Richard Reckson, Esquire, of the Miami law firm of Levine, Reckson & Reed, P.A. (which represents Defendants Alter and Steiner) prior to instituting suit, the CFTC filed its suit while Mr. Reckson was out of the country and unavailable to his clients, his partners and associates (Tr 21, 26, 27). Notification to Defendants Alter and Steiner of the institution of suit and the Motion for Temporary Restraining Order was given on the afternoon of June 1, 1977 by telephone to Mr. Reckson's partner, Allen P. Reed, Esquire (Tr 27). That same afternoon, Mr. Reed received a copy of the summons, complaint, affidavits and memorandum filed with the court (Tr 27). Despite the short notice, his partner's absence, the absence of information as to the people interviewed by the CFTC or other information, Mr. Reed flew to New York for the next day's hearing (Tr 27, 28).

After the conclusion of the hearing during the afternoon of June 2, 1977, Mr. Reed conferred with the attorneys for the CFTC and the attorneys for the other defendants; and he was then provided for the first time with several thousand pages of deposition testimony previously taken by the CFTC in Miami and elsewhere (Tr 28).

Upon returning to his office in Miami on the morning of June 3, 1977 (after a flight home the night before), Mr. Reed attempted to review and analyze the mass of materials, locate and interview not only his clients but also those people who are mentioned in the complaint, affidavits and depositions, and initiate some preliminary legal research (Tr 28).

After working through much of the night of June 3, 1977, Mr. Reed flew back to New York on Saturday, June 4, 1977, where he conferred with counsel for the other defendants, continued his attempts to digest and deal with the situation, locate and interview the people involved and prepare a defense (Tr 28, 29). The names of the CFTC's witnesses were not even revealed until then (Tr 22, 23). This hectic attempt to prepare continued unabated until the moment the hearing began at 10 a.m. on June 6, 1977 (Tr 29).

The court was requested to continue the hearing to another date, since the defendants were already out of business, and counsel had not had adequate time to prepare a defense, but the motion was denied (Motion for Continuance dated June 5, 1977; Affidavits of Joseph Alter and Joel Steiner dated June 4, 1977; Affidavit of Allen M. Goldschmidt dated June 2, 1977; Affidavit of David Greene, Esq. dated June 5, 1977; Tr 26-29). The

court was asked if an advancement and consolidation of the trial on the merits with the application for preliminary injunction was considered, and the court did not preclude that possibility, despite its denial of the Motion for Continuance (Tr 35).

ARGUMENT

POINT I

WHETHER DEFENDANTS JOSEPH ALTER AND JOEL STEINER WERE DENIED DUE PROCESS BY BEING COMPELLED TO PREPARE AND PRESENT A DEFENSE WITHIN AN UNREASONABLY SHORT TIME.

The Fifth Amendment to the United States Constitution states in part:

“No person shall . . . be deprived of life, liberty or property without due process of law”.

Courts in the Second Circuit have recognized that notice can be prejudicially inadequate because it provides insufficient time to prepare a defense. *S.E.C. v. Capital Growth Co., S.A. (Costa Rica)*, 391 F.Supp. 593 (S.D.N.Y. 1974). The United States Supreme Court in *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 314 (1950), set out the constitutional standard required for this form of procedural due process to be satisfied:

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and

afford them an opportunity to present their objections. . . . The notice . . . must afford a reasonable time for those interested to make their appearance."

Under the circumstances, Defendants Alter and Steiner were not afforded the reasonable time mandated by the Supreme Court. Less than one day elapsed between notification of the hearing on the motion for temporary restraining order and the hearing itself; and the hearing on the preliminary injunction took place less than four days after that, with a weekend intervening.

Defendants Alter and Steiner, their counsel, prospective witnesses, and all of their business records were in Miami, Florida. The hearing, however, took place in New York City. The Defendants' counsel was compelled, in four days, to wade through the data and affidavits presented by the CFTC, research the law on point, locate and interview prospective defense witnesses, attempt to prepare strategy and, at the same time, travel back and forth between New York and Miami.

The motion for continuance set forth in detail the grounds on which it was based. In denying this motion the trial court relied, in part, on its own ability to review the complaint and affidavits. (T-18). The court should have been aware that in order to prepare a defense it was necessary to do more than just read the complaint and affidavits.

In considering the adequacy of notice, the court should have also recognized that this case presented novel theories in a new and complex area of federal law, and that the CFTC had many months within which to prepare their case and supporting memoranda. The Defendants,

on the other hand, did not have anything other than an unreasonably short time within which to prepare for the hearing. The illusion of due process is not the equivalent of due process. The right of Defendants to prepare and present their defense is no right at all when they are denied reasonable time within which to do so.

A preliminary injunction is an extraordinary form of relief to be used sparingly. *Dyer v. Securities and Exchange Commission*, 291 F.2d 774 (8 Cir. 1961). As Judge Friendly stated in his dissent in *Securities and Exchange Commission v. Charles Plohn & Co.*, 433 F.2d 376 (2 Cir. 1970), a case in which the SEC requested a preliminary injunction against a stock brokerage firm,

"... In this circuit parties will not be divested of possession of their property even at the suit of the SEC, except in the direst emergency, without a full and fair opportunity to present their case."

Defendants Alter and Steiner were not, at the time the complaint was filed, nor, at the time of the hearing on the preliminary injunction, engaged in any proscribed acts [Affidavits of Joseph Alter and Joel Steiner dated June 4, 1977; Op. 20], and the corporate defendant had ceased all account activities in Miami and elsewhere [Affidavit of Allen M. Goldschmidt dated June 2, 1977]. The cessation of those activities was not prompted by the threat of suit, but rather by the double segregation requirements of the CFTC. [Affidavits of Joseph Alter and Joel Steiner dated June 4, 1977, paragraphs numbered 3.]

Because of Defendants voluntary cessation of business, the need to preserve the status quo was not so pressing that the court could not grant a continuance. A con-

tinuance of even one week would not have adversely affected either the CFTC or the public, and would have benefited the Defendants immeasurably. There was no justification for the denial of the most fundamental right of American jurisprudence, the right to answer charges brought against oneself.

A further problem was created by the situation involving FRCP 65(a) (2). That rule allows the trial court, before or after the commencement of hearing on application for preliminary injunction, to order the trial on the merits to be advanced and consolidated with the hearing on the injunction. Counsel for the Defendants Alter and Steiner inquired of the court whether it had any plan for consolidation at the outset of the hearing (T-35). Counsel was placed on the horns of a dilemma by the court's refusal to commit itself not to consolidate [Op. 21 (last sentence); TR-35]. On one hand, he could attempt to present a defense even though unprepared, and have a possible trial on the merits forced upon him, to his clients prejudice, when merely wishing to properly address the question of the preliminary injunction. On the other hand, he could cross examine plaintiffs' witnesses as best he could on such short notice, limiting his defense to attempts to discredit them. This could and eventually did result in an opinion and adverse decision wherein the Defendants were severely criticized for not presenting an adequate defense.

In light of the extreme time limits placed on Defendants and their counsel, their right to due process was violated by the court's action in holding the hearing on the motion for preliminary injunction when it did. Defendants had ceased activities, and there was no on-going threat of harm to be dealt with. Due process could have

been easily comported with by granting a continuance. The court did not do so, thus violating the Defendants right to timely notice, denying them the ability to answer and defend against the CFTC's charges, and denying due process.

POINT II

WHETHER THE TRIAL COURT ERRED IN GRANTING THE PRELIMINARY INJUNCTION IN LIGHT OF THE FACT THAT BOTH DEFENDANTS JOSEPH ALTER AND JOEL STEINER WERE NO LONGER ENGAGED IN THE COMMODITIES FIELD.

Defendants realize cessation is not in itself a bar to issuance of an injunction, *Hecht Co. v. Bowles*, 321 U.S. 321 (1944). The test is:

"Whether there exists a reasonable likelihood that the course of conduct will occur in the future" *Securities and Exchange Commission v. Dott*, 302 F.Supp. 169 (S.D.N.Y. 1969); *Commodities Future Trading Commission v. J. S. Love and Associates, Inc.* 422 F.Supp. 652 (S.D.N.Y. 1976).

The court should have considered the totality of the circumstances to determine whether, in light of all the evidence, there was a reasonable expectation that, without injunctive relief, the Defendants would thwart the policy of the law in question, by future proscribed acts. *Securities and Exchange Commission v. Culpepper*, 270 F.2d 241 (2 Cir. 1959); *Commodity Futures Trading Commission v.*

J. S. Love and Associates, Inc., 422 F.Supp. 652 (S.D.N.Y. 1976). In issuing an injunction, the court:

“must balance the public interest against the private interest”; *Commodity Futures Trading Commission v. British American Commodity Options Corp.*, 422 F.Supp. 662 (S.D.N.Y. 1976).

The sole contact of the Defendants Alter and Steiner with the commodities field had been their employment with Crown Colony's Miami branch office. [Affidavits of Joseph Alter and Joel Steiner dated June 4, 1977, paragraphs numbered 5] Crown Colony had voluntarily ceased doing business some time prior to the CFTC's request for a preliminary injunction and had closed its Miami branch office. The reason for the closing was not the threat of suit, but Crown Colony's inability to meet new CFTC regulations on segregation of client funds. There was thus no reasonable likelihood that the alleged wrong would be repeated. In *Securities and Exchange Commission v. Torr*, 87 F.2d 446 (2 Cir. 1937) a similar preliminary injunction was reversed in part because there was no support for the inference of repeated violations.

Employing the balancing test, the adverse effect of the injunction is self evident. Whether or not this cause is further pursued by the CFTC, Defendants Alter and Steiner are and will be stigmatized by this action.

Defendants Alter and Steiner are not now engaged in the commodities field. The corporation which employed them is no longer operating. They are, therefore, in no position to continue any activities that could expose them to any facet of commodities work. Thus, their future violations of the Commodities Act are not a realistic possibility, and a preliminary injunction is unwarranted.

CONCLUSION

Defendants Alter and Steiner were denied due process. They were not afforded a reasonable opportunity to adequately prepare for and defend the case. The inadequate time was further complicated by the possibility of consolidation of the motion for preliminary injunction and trial on the merits under Federal Rule of Civil Procedure 65(a) (2). A continuance would not have harmed the CFTC or the public, but would have immeasurably aided Defendants and comported with the mandates of the Supreme Court in the area of due process. Both Defendants Alter and Steiner, as well as Crown Colony had ceased doing business before the CFTC acted. Their cessation was in no way due to the threat of CFTC action. There was, therefore, no reason to grant the relief requested by the CFTC, as it served no purpose.

For the above reasons, Defendants Alter and Steiner request that the preliminary injunction be vacated.

Respectfully submitted,
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— AND —

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BY /s/ Allen P. Reed

ALLEN P. REED
For the Firm

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellants Joseph Alter and Joel Steiner was mailed by ordinary mail to RICHARD A. LEVIE, ESQ., Commodity Futures Trading Commission, One World Trade Center, New York, New York 10048; MARTIN H. KAPLAN, ESQ. and DAVID GREENE, ESQ., Gusrae, Greene & Kaplan, Attorneys for Appellants Crown Colony Commodity Options, Ltd., Allen M. Goldschmidt and Arnold Tenney, 67 Wall Street, New York, New York 10005; and JOSEPH CALLAHAN, ESQ., Callahan & Wolkoff, Attorneys for Defendant Martin Davidson, 67 Wall Street, New York, New York 10005, this ~~17th~~ day of ~~November~~, 1977.

~~December,~~
Respectfully submitted,

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December 14, 1977

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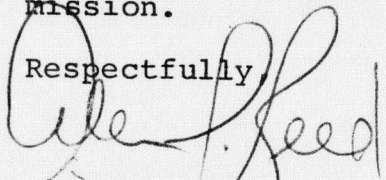
RE: Commodity Futures Trading Commission,
Plaintiff-Appellee
vs.
Crown Colony Commodity Options Ltd., et al.,
Defendants-Appellants
Docket No. 77-6134 and 77-6136

Dear Sir:

In accordance with Rule 31 of the Federal Rules of Appellate Procedure, enclosed herewith are twenty-five copies of the Brief of Appellants Joseph Alter and Joel Steiner.

Simultaneously herewith, two copies each of the aforementioned brief were mailed to Martin H. Kaplan, Esq. and David Greene, Esq., Attorneys for Appellants Crown Colony Commodity Options, Ltd., Allen M. Goldschmidt and Arnold Tenney; Joseph Callahan, Esq., Attorney for Defendant Martin Davidson; and, Richard A. Levie, Esq. of the Commodity Futures Trading Commission.

Respectfully,


ALLEN P. REED
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APR:lac
encs.

CERTIFIED MAIL-RETURN RECEIPT REQUESTED.

cc: Attorneys of Record